Binastra Holdings Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R2–14–8 OF 2000
FAIZA TAMBY CHIK J
7 DECEMBER 2000

Revenue Law *— Real property gains tax — Assessment — Gains from disposal of shares from a company which is a property developer — Shares of company bought by appellant after company has acquired property for development — Whether gains from disposal of shares liable for assessment — Real Property Gains Tax Act 1976 Sch 2 para 34A*

The appellant acquired 9,400 shares, 30,000 shares and 35,600 shares on 15 June 1996, 21 June 1996 and 27 July 1996 respectively (totaling 75,000 shares) in Sukma Pesona Sdn Bhd ('the Company'). The Company is a property developer and is registered owner of the land held under Lot 3001 and Lot 1099 ('the said land'). The said land was alienated to the Company by the Selangor State Government on 7 July 1995 for purposes of development and sale as housing units. The appellant later sold the 75,000 shares in the Company to Sin Heap Development Sdn Bhd ('Sin Heap') on 6 April 1998 for RM600,000. The respondent raised a notice of assessment against the appellant under para 34A of Sch 2 of the Real Property Gains Tax Act 1976 ('the Act') for an amount of RM173,000, inclusive of penalty. The appellant disputes the notice of assessment. The issue to be determined in this appeal was whether the gains by the appellant from the disposal of shares in the Company to Sin Heap fell within the ambit of the Act.

Held, allowing the appeal with costs:

(1) The appellant is not an individual who had used a company to acquire land and dispose of shares in that company thereby avoiding payment of real property gains tax, having only bought shares in the Company which had already acquired the property to be developed. In the present case, the property has been acquired by the Company on 7 June 1995 prior to the appellant's acquisition of shares of the Company on 15 June 1996, 21 June 1996 and 27 June 1996 respectively. Therefore, the gains made under the disposal of shares had placed it out of the ambit of para 34A of Sch 2 of the Act. It is therefore wrong for the respondent to raise the notice of assessment for the disposal of shares in the Company (see pp 487H–488A).

(2) The respondent has erred in that it applied the policy that the Act is to catch individuals who try to avoid the Act on land purchase and sale by using a company to acquire real property and then making gains by disposing of the shares in the company rather than disposing of the land itself. It has failed to consider whether the appellant was such an individual ignoring the fact that the

subject company and the shares thereof were never used in such avoidance vis a vis the real property held by the Company; and the subject company was a concern with regard to the development and realization of the real property. The appellant was obviously a person who had ventured in the nature of trade in land and not a speculator in land. Paragraph 34A of Sch 2 of the Act if given a catch-all absolute definition interpretation, as contended by the respondent, is going against the intention of parliament (see p 489A–C, G).

(3) Under Malaysian law, tax is imposed on such asset albeit comprising land, as stock in trade and not as real property. When the Company sells the property, real property gains tax cannot be imposed, and the assessment is under income tax. Therefore, in this instance, the asset of the Company is not a real property comprising land, but stock in trade, with no chargeable asset under the Act (see p 490B).

(4) For a 'gain' to fall under gain chargeable under the Act, a company must be a real property company as determined by para 34A of Sch 2 of the Act. But what must precede this determination is a determination on the facts adduced and accepted as being not in dispute, namely whether the gain of the stock in trade is liable to income tax. The Income Tax Act 1967 ('the 1967 Act') being the main Act, 'gain' that fell within the 1967 Act is not to be taxed as gain under the Act. Once a gain is found to be a gain under the 1967 Act, an assessment to real property gains tax becomes invalid. The Special Commissioners were wrong in disregarding the fact that the tangible asset as the real property in this case was in the form of stock in trade, the gain of which is chargeable under income tax (see p 491A, D–E).

(5) Paragraph 34A of Sch 2 of the Act is a deeming provision. To give the words used their ordinary meaning, there must be a chargeable asset before we look at what is deemed to be a chargeable asset. Where there is no chargeable asset, the question of what is deemed to be chargeable asset does not arise. In the present case, where the stock in trade of the Company does not fall as chargeable asset, the question of share of the appellant being deemed to be chargeable asset does not arise (see p 492D, H).

[Bahasa Malaysia summary

Perayu memperolehi 9,400 unit saham, 30,000 unit saham dan 35,600 unit saham pada 15 Jun 1996, 21 Jun 1996 dan 27 Julai 1996 masing-masing (berjumlah 75,000 unit saham) dalam Sukma Pesona Sdn Bhd ('Syarikat tersebut'). Syarikat tersebut merupakan satu pemaju hartanah dan adalah pemilik berdaftar tanah yang dipegang di bawah Lot 3001 dan Lot 1099 ('tanah tersebut'). Tanah tersebut

diberimilik kepada Syarikat tersebut oleh Kerajaan Negeri Selangor pada 7 Julai 1995 bagi tujuan-tujuan pembangunan dan jualan sebagai unit perumahan. Perayu kemudiannya menjual 75,000 unit saham Syarikat tersebut kepada Sin Heap Development Sdn Bhd ('Sin Heap') pada 6 April 1998 untuk RM600,000. Responden mengemukakan satu notis penilaian terhadap perayu di bawah perenggan 34A, Jadual 2 Akta Cukai Keuntungan Harta Tanah 1976 ('Akta tersebut') bagi jumlah RM173,000 termasuk penalti. Perayu mempertikaikan notis penilaian. Perkara untuk diputuskan dalam rayuan ini adalah sama ada keuntungan yang diperolehi oleh perayu dari penjualan saham Syarikat tersebut kepada Sin Heap jatuh di dalam lingkungan Akta tersebut.

Diputuskan, membenarkan rayuan tersebut dengan kos:

(1) Perayu bukannya seorang individu yang telah menggunakan sesebuah syarikat untuk memperolehi hartanah dan menjual saham di dalam syarikat tersebut dan dengan itu mengelak bayaran cukai keuntungan harta tanah, dengan hanya membeli saham Syarikat tersebut yang telahpun memperolehi hartanah tersebut untuk dibangunkan. Dalam kes ini, hartanah tersebut telah diperolehi oleh Syarikat tersebut pada 7 Jun 1995 sebelum perayu memperolehi saham Syarikat tersebut pada 15 Jun 1996, 21 Jun 1996 dan 27 Jun 1996 masing-masing. Oleh itu, keuntungan yang didapati dari penjualan saham telah meletakkannya di luar lingkungan perenggan 34A jadual 2 Akta tersebut. Oleh itu, ia salah bagi responden mengemukakan notis penilaian untuk jualan saham Syarikat tersebut (lihat ms 487H–488A).

(2) Responden tersilap kerana ia memakai polisi bahawa Akta tersebut adalah untuk memerangkap individu-individu yang cuba mengelakkan Akta tersebut berkaitan belian dan jualan hartanah dengan menggunakan sebuah syarikat untuk memperolehi hartanah dan kemudiannya meraih keuntungan dengan menjual saham-saham syarikat dan bukannya menjual tanah tersebut. Ia gagal mempertimbangkan sama ada perayu adalah seorang individu sedemikian dan tidak mempedulikan hakikat bahawa syarikat tersebut dan saham-sahamnya tidak pernah digunakan untuk pengelakan seperti ini melalui hartanah yang dimiliki oleh syarikat tersebut; dan syarikat tersebut merupakan satu kepentingan berkenaan pembangunan dan kewujudan hartanah. Perayu jelasnya seseorang yang mengendalikan perniagaan hartanah dan bukannya seorang spekulator hartanah. Perenggan 34A jadual 2 Akta tersebut jika diberikan satu tafsiran mutlak, seperti yang dihujahkan oleh responden, akan melanggar niat parlimen (lihat ms 489A–C, G).

(3) Di bawah undang-undang Malaysia, cukai dikenakan ke atas aset-aset sedemikian kecuali ia merangkumi tanah sebagai stok perniagaan dan bukan sebagai hartanah. Apabila Syarikat tersebut

menjual hartanah tersebut, cukai keuntungan hartanah tidak boleh dikenakan, dan penilaiannya adalah di bawah cukai pendapatan. Oleh itu, dalam situasi ini, aset Syarikat tersebut bukannya hartanah berbentuk tanah, tetapi stok dalam perniagaan, tanpa aset bolehcukai di bawah Akta tersebut (lihat ms 490B).

(4) Bagi satu 'keuntungan' jatuh dalam lingkungan keuntungan yang boleh dicukai di bawah Akta tersebut, sesuatu syarikat mestilah merupakan satu syarikat hartanah seperti yang diputuskan oleh perenggan 34A jadual 2 Akta tersebut. Tetapi apa yang mesti mendahului keputusan ini ialah keputusan di atas fakta-fakta yang dikemukakan dan diterima tanpa dipertikaikan, yakni sama ada keuntungan dari stok dalam perniagaan tersebut boleh dikenakan cukai pendapatan. Akta Cukai Pendapatan 1967 ('ACP') ialah Akta yang utama, 'keuntungan' yang dirangkumi ACP tidak boleh dicukai sebagai keuntungan di bawah Akta tersebut. Sekiranya sesuatu keuntungan didapati adalah satu keuntungan di bawah ACP, satu penilaian cukai pendapatan harta tanah menjadi tidak sah. Pesuruhjaya Khas tersilap kerana tidak mempedulikan fakta bahawa aset ketara, seperti hartanah dalam kes ini, berbentuk stok dalam perniagaan, dan keuntungannya boleh dicukai sebagai cukai pendapatan (lihat ms 491A, D–E).

(5) Perenggan 34A jadual 2 Akta tersebut merupakan satu peruntukan anggapan. Untuk memberikan perkataan-perkataan yang digunakan maksud biasa mereka, mestilah terdapat satu aset bolehcukai sebelum kita mempertimbangkan apa yang boleh dianggap sebagai aset bolehcukai. Apabila tiada aset bolehcukai, soalan apa yang boleh dianggap sebagai aset bolehcukai tidak timbul. Dalam kes ini, kerana stok dalam perniagaan Syarikat bukan satu aset bolehcukai, soal saham perayu dianggap sebagai aset bolehcukai tidak timbul (lihat ms 492D, H).]

Notes

For cases on real property gains tax generally, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1974–1977.

Cases referred to

I Investment Ltd v Comptroller-General of Inland Revenue [1975] 2 MLJ 208 (refd)

Marshall (Inspector of Taxes) v Kerr (1933) STC 360 (refd)

Legislation referred to

Finance Act 1988
Income Tax Act 1967

Real Properties Gains Tax Act 1976 ss 2, 3, para 4A(1) of Sch 2, para 34(6), para 34A, Sch 2, para 34A(6),

Appeal from: Pesuruhjaya Khas Cukai Pendapatan, Rayuan No PKCP(R) 65/99

YM Leow (*YM Leow & Partners*) for the applicant.
Ahmad Khairuddin (Inland Revenue Board) for the respondent.

Faiza Tamby Chik J. : This is an appeal by case stated to determine the following issue: whether the gains made by the appellant from the disposal of shares in Sukma Pesona Sdn Bhd to Sin Heap Lee Development Sdn Bhd falls within the ambit of the Real Properties Gains Tax Act 1976 ('the Act'). The facts of this case are contained in the statement of agreed facts and are produced here for ease of reference.

Facts admitted

1 The appellant acquired 9,400 shares, 30,000 shares and 35,600 shares on 15 June 1996, 21 June 1996 and 27 July 1996 respectively (totalling 75,000 shares) in SUKMA PESONA SDN BHD ('the Company');

2 the Company is a property developer and is the registered owner of the land held under Lot 3001 and Lot 1099, Mukim of Cheras, District of Hulu Langat, State of Selangor comprising 40 acres;

3 the said land was alienated to the Company by the Selangor State Government on 7 June 1995 for purposes of development and sale as housing units;

4 the land was converted for housing development. Professionals and contractors were appointed for the development and activities were carried out leading to the maturing of the asset;

5 the appellant sold 75,000 shares to Sin Heap Lee Development Sdn Bhd on 6 April 1998 for RM600,000;

6 the respondent raised a notice of assessment against the appellant under para 34A of Sch 2 of the RPGT Act on 19 June 1999 for an amount of RM173,200 inclusive of penalty; and

7 the appellant disputes the notice of assessment.

Facts proved:

1 The appellant was incorporated on 16 April 1990;

2 the appellant is a holding and investment company;

3 the shares in Sukma Pesona Sdn Bhd were acquired by the appellant by allotment at RM1 each;

4 Sukma Pesona Sdn Bhd carrried out various activities as set out below in respect of the land it owns ('the subject land'):

(a) obtained approval for a developer's licence;

(b) appointed professionals and project manager for the development, namely:
   (i) quantity surveyors;
   (ii) engineers;
   (iii) architect;
   (iv) M & E engineers;
   (v) civil and structural engineer;
   (vi) project manager; and
   (vii) land & engineering surveyors;

(c) layout plans for the development of the subject land was approved by the authorities for the development of houses;

(d) the subject land was sub-divided into separate individual titles for sale with buildings thereon as stock in trade;

(e) house plans were drawn by the architect for approval by the authorities;

(f) plans for telecommunications, supply of electricity and water were submitted to the relevant authorities;

(g) a turnkey contractor was appointed to complete the entire development and construction of the houses and commercial units;

(h) loans were raised and part of the loans were disbursed to meet the costs of work in the development and interest was paid;

(i) works on earthworks, road and drains and payments were made for the works to contractors; and

(j) solicitors were appointed to prepare sale and purchase agreements of the units to be sold.

Disposal of shares per se does not attract Real Property Gains Tax ('RPGT'). By the true interpretation of the Act, the disposal of shares by the appellant in this instance cannot be subjected to RPGT, specifically para 34A of Sch 2 thereunder. The appellant's points against the respondent's notice of assessment are: (1) the appellant is outside the shoal of property speculators that the said para 34A net was woven to catch and (2) the appellant is not a real property company within the meaning of para 34A due to the deeming provision of the paragraph has imputed the equation was qualifiable that the character of the asset of the Company to be as one in nature as with the shares therein, ie as stock in trade which is not subject to RPGT, and (3) the court must define the deeming provision according to the policy and purpose thereof so as not to arrive at an absurd or unjust decision. The court is to give the purposive interpretation to the Act, especially to the intention of Parliament in enacting the insertion of para 34A into the said Sch 2 which is subsidiary to the Act itself. It is pertinent to go into the background of the said para 34A of Sch 2, as described by Veerinderjeet Singh in *Malaysian Taxation — Third Edition* at p 911:

REAL PROPERTIES COMPANIES

> It was possible to avoid [Real Property Gains Act] (RPGT) by incorporating a property holding company to acquire a chargeable asset (other than from an individual controlling such a company) and alter disposing the shares in the property holding company instead of the property. Recognizing the potential avoidance of RPGT through such an arrangement, the Share (Land-Based Company) Transfer Tax Act 1984 was enacted to impose a tax on the transfer of shares in a land-based company. Share transfer tax ('STT') was imposed on the disposal of shares in companies having land as part of their asset. This tax applied to disposals made on or after 19 October 1984.
>
> The STT Act provided that STT was charged on the value of every disposal of shares in a land-based company at a rate of 2% on the gross value of every disposal of RM1m or more. It is important to note that the tax was imposed on the value of shares and not the gain accruing on the disposal. STT was not a tax on capital gains; it was tax on the transfer or disposal of shares. STT was therefore payable even on a disposal of shares which resulted in a loss. The scope of STT extended beyond its original objective of sealing the RPGT loophole and covered transactions other than those designed for the avoidance of RPGT.
>
> The STT Act was eventually repealed with effect from 21 October 1988. In place of the STT Act, a new para 34A was introduced in Sch 2 of the Act with effect from 21 October 1988. This amendment was introduced with the view to impose RPGT on the gains arising from the disposal of shares in real property companies.
>
> This was introduced to prevent avoidance of RPGT by way of selling shares in a company instead of the real property owned by the company. Therefore, a liability is imposed on gains made on the disposal of shares in controlled companies holding real property directly or indirectly as a major asset.

It is observed that the respondent had, in para 3.4 of its written submission for the appeal to the Special Commissioners of Income Tax, brought up the Explanatory Statement of Finance Bill 1988 (which Finance Act 1988 introduced the said para 34A in Sch 2 of the Act) which states at para 19 as follows:

> Clause 24 [of the Finance Act] seeks to introduce a new para 34A of Sch 2 to the Act. The amendment is intended to ensure that individuals do not use companies to acquire land and then dispose of shares in such companies thereby avoiding payment of real property gains tax. The amendment applies only to controlled companies holding real property directly or indirectly as a major asset. Gains from the disposal of shares in such companies which will be known as 'real property companies', will be liable to tax. The amendments will come into force on 21 October 1988.

The sequence of the shares' acquisition and subsequent disposal thereof by a real property company, which para 34A was designed to catch, is a factor in such assessment. The appellant is not an individual who had used a company 'to acquire land and then dispose of shares' in that company 'thereby avoiding payment of RPGT', having only bought shares in the Company which had already acquired the property to be developed. In this instance, the property has been acquired by the Company on 7 June 1995 prior to the appellant's acquisition of the shares of the Company on 25 June

1996, 21 June 1996 and 27 June 1996. Therefore the appellant cannot be an individual who used the Company in order to purchase the subject real property. On this count alone, the gains made under the disposal of the shares had placed it out of the ambit of para 34A of Sch 2 of the Act. It is therefore wrong for the respondent to raise the notice of assessment for the disposal of the shares in the Company. Further, the loophole Parliament sought to seal was the scheme whereby the dealer of a property uses a company as a vehicle to avoid the RPGT. In assessing whether there was liability for tax incurred, evidence on the nature and intent of the transaction is relevant. The question to be asked is: is the real property acquired for the purpose of speculation on the appreciation of the price of the property, or for investment by an adventure in the nature of trade? Paragraph 4A(1) of Sch 2 of the Act states:

> An acquisition of shares in a real property company (hereinafter referred to in this para as 'the relevant company') shall be deemed to be an acquisition of a chargeable asset, and where such shares are disposed of, such a disposal shall be deemed to be a disposal of a chargeable asset notwithstanding that at the time of disposal of such shares the relevant company is not regarded as a real property company.

In the framing of this paragraph, Parliament was clearly equating or associating the shares of a company with the real property held by the Company for the purpose of taxation, and in doing so, must have consideration for any adventure in the nature of trade performed on the property. It has been established that the appellant had held the Company as a vehicle to develop land alienated to it by the Selangor State Government, and not merely as a dealer in the property in order to dispose of at a profit and to avoid RPGT. This para 34A was intended to catch such evasions. It is important to note that Parliament had used the word '*deemed*' to connect an acquisition of shares in a real property company to an acquisition of a chargeable asset, rather than inserting it into the already existing definitions sub-para (6) of the paragraph to state:

> [(6) For the purpose of this paragraph –]
> 'acquisition of a chargeable asset' means acquisition of shares in a real property company.

Consider also the way the word has been used in s 1 of the Act:

> This Act may be cited as the Real Property Gains Tax Act 1976, and shall be deemed to have come into force on 7 November 1975.

This para 34A had sought to utilize two different modes of sentence construction to define given words or phrases, which were deliberately so done to convey how the said words or phrases were to be interpreted and applied. When the term 'means' is used, the equation is absolute; eg such as is used in a loan document: 'working day' means a day from Monday to Friday inclusive, not being a public holiday. Using the word 'deemed' shows that the definition is qualifiable whether by gloss, supporting or rebutting events, policy or legal provisions; eg such as is used in a loan document: a notice is deemed served on the other party three days after

posting thereof (a presumption rebuttable by proving a postal strike had occurred at the time of the purported serving of the notice). In this case before us, there is a policy behind the purpose or thrust of the statement or command. The whole of the policy in making the provision must be given full force and applied. In this case, the respondent has erred in that it applied the policy that the Act is to catch the individuals who try to avoid RPGT on land purchase and sale by using a company to acquire real property and then making gains by disposing of the shares in the Company rather than disposing of the land itself, but it has failed to consider whether the appellant is such an individual ignoring the fact that:

(1) the subject company and the shares thereof were never used in such avoidance vis-à-vis the real property held by the Company, and

(2) the subject company was a concern with regard to the development and realization of the real property.

In *Marshall (Inspector of Taxes) v Kerr* (1933) STC 360, Peter Gibson J stated at p 336:

> For my part, I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of that fiction.

In the instant case, it has been shown that the appellant had via Sukma Pesona Sdn Bhd held the land alienated from the state government, which was developed professionally as a property developer for the purpose of selling the units of houses to the public, and due to the misfortune of the failure to settle the matter of the access road for the housing estate with the developer of the neighbouring estate, Sin Heap Lee Development Sdn Bhd, the appellant had to sell the development to the said Sin Heap Lee Development Sdn Bhd. In this situation it is absurd to use the deeming provision of the para 34A as the instrument to impose RPGT on the appellant, for such is clearly repugnant to the purposes of the Act itself — ie, to catch speculators who use a real property company to speculate on land. The appellant is obviously a person who had ventured in the nature of trade in the land and not a speculator of land. That said para 34A, if given a catch-all absolute definition interpretation as contended by the respondent, is going against the intention of the Act of Parliament itself. It is noted that the appellant had never contended that all disposal of shares in real property companies do not attract RPGT. The STT Act had been repealed and was replaced with para 34A of Sch 2 of the Act enacted, for a reason — to do away with the extraordinarily encompassing reach of the STT Act. To lend support to the appellant's contention, 'gain' is defined in s 2 of the Act as 'gain other than gain or profit chargeable with or exempted from income tax'. It is therefore the purpose of the Act that RPGT is imposed only when a transaction is not chargeable under or exempted from income tax. Income tax takes precedence over RPGT. Further, the Special

Commissioners for Income Tax had erred in holding that 'Sukma Pesona Sdn Bhd is a real property company within the meaning of sub-para (a) of the definition of a 'real property company in para 34A(6) Sch 2 of the Act'.

It was a fact proven herein that the subject land was subdivided into separate individual titles for sale with buildings thereon as stock in trade, due to the activities of the Company in working on and maturing the land. Under Malaysian law, tax is imposed on such assets albeit comprising land, as stock in trade and not as real property. When the Company sells the property, RPGT cannot be imposed, and the assessment is under income tax. Therefore in this instance, the asset of the Company is not real property comprising land, but stock in trade, with no chargeable asset under the Act. Paragraph 34A(6) requires that a 'real property company' must be a controlled company and the defined value of real property or shares or both it owns is not less than 75% of the value of its real property or shares or both it owns is not less than 75% of the value of its total tangible asset. Paragraph 34A purports to equate the shares of a company with the character of its assets. When in this instance the character of its asset is not real property, this subject company cannot be, by such definition, a real property company and the Act does not apply. The character of the shares of the Company was by the qualifiable equation stock in trade, and thus disposal thereof goes under income tax. The Act ceases to be in the picture altogether. It must be noted that 'once a gain is found to be under the income tax law, an assessment to RPGT becomes invalid.' Therefore the gloss of the activity of a company, as well as the dates of the acquisitions of the shares in the Company and the acquisition of real property by the Company are essential considerations in assessing the category of taxation of such kind. The respondent when raising a notice of assessment of RPGT against the appellant had shown that it had failed to address its mind to the whole circumstances in regard to the acquisition of the property and subsequently of the shares and the disposal thereof upon the difficulties encountered during the development of the said property, and the qualified equating by Parliament of the shares of a company to the character of the asset that the Company holds. The respondent had wrongly categorized the tax upon failure to consider the policy of the Act, which excludes imposition of RPGT on gains of shares of this nature.

The Special Commissioners erred in law in their determination:

(a) that Sukma Pesona Sdn Bhd is a 'real property company' and fell within the definition of para 34A(6) of Sch 2 of the Act;

(b) that after having heard that on Lot 1099, Mukim of Cheras, Hulu Langat, Negeri Cheras, Hulu Langat, Negeri Selangor comprising 40 acres, Sukma Pesona Sdn Bhd had carried out various activities as outlined in para 4, the special commissioners accepted that the land matured into stock in trade is liable to income tax, but ignored this fact.

(c) that the acquisition and disposal of the shares in Sukma Pesona Sdn Bhd was an acquisition and disposal of assets deemed to be 'chargeable assets' under para 34A of Sch 2 of the Act.

That for a gain to fall under 'gain' chargeable under the Act, a company must be a real property company as determined by para 34A Sch 2 of the Act. But what must precede this determination is a determination on the facts adduced and accepted as being not in dispute, namely whether the gain of the stock in trade is liable to income tax. Notwithstanding the fact that the respondent accepts this to be so, the special commissioners chose to ignore this fact and proceeded to determine whether the gain was a 'chargeable gain' under the Act. Where the 'gain' failed to be taxed under the Income Tax Act 1967 ('the 1967 Act'), the provisions of s 2 of the 1967 Act defining 'gains' apply.

'Gain' means:

(a) gain other than gain or profit chargeable with or exempted from income tax under the income tax law, or

(b) [not applicable]

The legislature's intention is clear here in that the 1967 Act being the main Act, 'gain' that fell within the ambit of the 1967 Act was not to be taxed as 'gain' under the RPGT. There is no ambiguity here. It must be noted that once a gain is found to be a gain under the 1967 Act, an assessment to RPGT becomes invalid. It is true that where a company owns real property or shares, the defined value of which is not less than 75% of the total tangible assets and is a controlled company, the Company is a 'real property company' as defined in para 34A(6) of Sch 2 of the Act. The special commissioners were however wrong in disregarding the fact that the tangible asset as the 'real property' in this case was in the form of stock in trade, the gain of which was chargeable under income tax. That being so, the 'gain' was no more a 'chargeable gain' under s 3 of the Act which reads:

> 3 Taxation of chargeable gains
>
> (1) A tax to be called real property gains tax, shall be charged in accordance with this Act in respect of chargeable gain accruing on disposal of any property (hereinafter referred to as 'chargeable asset').

The operative words are 'chargeable gain accruing on the disposal of any real property'.

As the 'gain' is chargeable under the 1967 Act as chargeable gain on disposal of the property as stock in trade, the same 'gain' cannot be a 'chargeable gain' to be taxed as RPGT. That being so, the stock in trade in this case was not a 'chargeable asset' within the meaning of s 3 of the Act. It would be clearly an error in law to apply para 34A(6) of Sch 2 of the Act in isolation as the special commissioners did in this case. As put rightly by Raja Azlan Shah J (as DYMM then was) in *I Investment Ltd v Comptroller-General of Inland Revenue* [1975] 2 MLJ 208 at p 212:

> When we come to deal with income tax, we must look at all surrounding circumstances … for the purpose of seeing in fact whether there is evidence upon which the special commissioners could arrive at their conclusions.

I am of the view that the word 'real property' is defined in s 2 of the Act as 'any land situated in Malaysia and any interest, option or other right in or over said land', but I do not agree that the definition does not differentiate between the property acquired by the Company for stock in trade or for the purposes of investment, and further I do not agree with the respondent's contention that the fact that the land was stock in trade is 'irrelevant'. The respondent has insisted on this definition in isolation from the definition of 'gain' given in the same section of the Act. The definition of 'gain' has brought the appellant out from the ambit of the Act. The acquisition of the property which value was stock in trade and the sale thereof are very relevant to determine whether the 'gain' in the disposal of the stock in trade is 'gain' falling to be chargeable gain under income tax. It is observed that the respondent had examined in detail the facts defining the asset as stock in trade and does not dispute the fact that the 'chargeable gain' is subject to income tax, but chooses to disregard this fact as irrelevant and falls back to the definition of 'real property' to distinguish the 'chargeable gain' of the stock in trade which falls under income tax law, and to treat the 'gain' on disposal of the stock in trade as 'chargeable gain' accruing in the disposal of real property within the meaning of s 3 of the Act. Paragraph 34(2) Sch 2 of the Act is a deeming provision. To give the words used their ordinary meaning, there must be a 'chargeable asset' before we look at what is 'deemed to be chargeable assets'. Where there is no chargeable asset, the question of what is 'deemed to be chargeable assets' does not arise. The policy of para 34(6) of Sch 2 of the Act is to bring within the provision of the Act disposal of shares, 'deemed to be chargeable assets'. The crux of the matter here is that before one treats the shares as deemed to be 'chargeable assets', one has to determine whether there is a 'chargeable asset' within the meaning of s 3 of the Act. As the 'chargeable gain' falls within the ambit of income tax law, the gain does not fall under s 3 of the Act to be treated as 'chargeable gain', and hence the asset is not a 'chargeable asset'.

I am not in disagreement that it is trite law that the shareholder and company are separate legal entities. But in the case of the RPGT, the law states that the shares held by the shareholders are, under certain circumstances, tainted with assets of the Company by a 'deeming' provision. The law equates the shares of the shareholder with the tangible assets of the Company. Whilst treating the shareholder and the Company as two separate entities, the law here by way of the deeming provision, places the shares and the property as being the same entity under the circumstances in para 34A of Sch 2 of the Act. The equation of the tangible asset of Sukma Pesona Sdn Bhd with the 'shares' of the shareholder, Binastra Holdings Sdn Bhd, would only arise if the tangible asset of Sukma Pesona Sdn Bhd is a 'chargeable asset' under s 3 of the Act. Where the stock in trade of Sukma Pesona Sdn Bhd does not fall as 'chargeable asset', the question of shares of Binastra Holdings Sdn Bhd being 'deemed to be chargeable asset' does not arise. The whole issue is centered around the subject land and the classification of its tangible assets. The land was alienated by the Selangor State Government with the condition that it was to be developed for housing. Therefore the property of the Company was

A stock in trade. From day one it was acquired by the Company and disposal of the property would attract income tax and not RPGT. Consequently, the Company had never held the land as a land chargeable asset. In the circumstances, Sukma Pesona Sdn Bhd could never be classified as a real property company as it never had the defined value of at least 75% of its tangible assets.

B Although Sukma Pesona Sdn Bhd is not the appellant in this case, introduction of the provisions of para 34A(6) of Sch 2 of the Act has the effect of relating the property of Sukma Pesona Sdn Bhd, which property is the subject matter to the shares held by the appellant. The opening sentence of para 34A of Sch 2 of the Act states the relevance between the shares held C by a shareholder and a real property company. If there is no 'real property company', there is no 'chargeable asset', and if there is no 'chargeable asset', the shares cannot be deemed to be 'chargeable assets'. I think Parliament's intention was to cover a loophole used by evaders of RPGT utilizing companies, and not to throw the tax net by way of introducing a paragraph in Sch 2 to prevail over the entire provisions of the RPGT, including the D provisions in the section of the Act on the definition of 'gain'. This is a misconception of the law. Clause 14.1 of the sale and purchase agreement referred to by the respondent is a general provision included by the solicitors in all cases, whether there were incidences of RPGT or not. It is a safeguard provision and in no way goes to establish that RPGT must be imposed every time such a clause appears in any agreement.

E In conclusion, my view is that the said para 34A is clearly inapplicable in these circumstances, and the definition of 'gain' in the Act has placed the tax payable by the appellant under the 1967 Act. For these reasons, my answer to the issue of this appeal is therefore 'no' and in the premises the appeal is allowed with costs.

F *Appeal allowed with costs.*

Reported by Wong Siok Chin

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